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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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MAR 10 1997

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| In the Matter of | ) | |
| Implementation of Section 402(b)(1)(A) of the Telecommunications Act of 1996 | ) | CC Docket No. 96-187 |

# AT&T CORP. PETITION FOR RECONSIDERATION

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## SUMMARY

AT&T Corp. hereby petitions the Commission to reconsider its Report and Order ("Order") in CC Docket No. 96-187 in four respects:

(i) The Order concludes that § 402(b)(1)(A)'s provision that certain tariff filings "shall be deemed lawful" after 7 or 15 days, unless suspended by the Commission, immunizes a carrier filing such a tariff from any obligation to pay damages in the event its tariff is later found to be unjust or unreasonable pursuant to a § 205 investigation or a § 208 complaint. This interpretation is an impermissible reading of the statute, and finds no support in the structure of the 1996 Act, case law, equity or logic.

(ii) The Order purports to allow 3 days for preparation of oppositions to tariff filings under § 402(b)(1)(A), and expressly concludes that allowing only one business day would not be sufficient to allow commenters to express their views. However, because the Commission measures this three-day period in calendar days, it has established a procedure which virtually assures that most § 402(b)(1)(A) tariff filings will be made late on Friday afternoons, thereby permitting opponents only a single business day to obtain and review the tariffs and prepare their responses. To resolve this inconsistency and permit a meaningful opportunity for public comment, the Commission should require that the three calendar days which commenters are allotted to prepare their petitions must include at least two business days.

(iii) The Order requires price cap LECs to file their tariff review plan ("TRP") materials, with rate information omitted, ninety days prior to their annual access tariff filings. The Commission expressly found that the "volume and complexity" of TRP

materials necessitated early filing in order to make meaningful review possible. However, the Commission permitted rate-of-return LECs to file their TRPs concurrently with their annual access tariffs, although it gave no basis for this distinction. Rate-of-return LECs' TRPs are fully as complex and voluminous as those of price cap LECs, and potential petitioners will be required to perform the same analyses in order to evaluate both types of filings. Accordingly, the logic of the Order compels that rate-of-return LECs must also be required to file TRP information 90 days prior to their annual access filings.

(iv) AT&T and other parties demonstrated in their comments that the same reasoning the Commission adopted in requiring advance filing of TRPs applies with equal force to mid-term LEC tariff filings that propose changes to PCIs. Such filings, like TRPs, are voluminous and highly complex, and cannot be adequately reviewed by the Commission or other parties within the abbreviated time frames established for rate filings under § 402(b)(1)(A). The Order does not address this issue. AT&T requests that the Commission apply the same reasoning to mid-term filings that prompted it to require advance filing of annual access TRPs, and hold that LECs must provide TRPs and cost support data at least 30 days in advance of any mid-term change to their PCIs.

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PETITION FOR RECONSIDERATION

Pursuant to Section 1.429 of the Commission's Rules, AT&T Corp. ("AT&T") hereby requests that the Commission reconsider its Report and Order[1] ("Order") implementing the LEC tariff streamlining provisions of § 402(b)(1)(A) of the Telecommunications Act of 1996 ("1996 Act").

## I. THE ORDER'S READING OF "DEEMED LAWFUL" IS NOT A PERMISSIBLE INTERPRETATION OF § 402(b)(1)(A)

The Order adopts the first of the two interpretations of § 402(b)(1)(A)'s "deemed lawful" provision proposed in the NPRM,[2] finding Congress intended that phrase

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1 Report and Order, Implementation of Section 402(b)(1)(A) of the Telecommunications Act of 1996, CC Docket No. 96-187, FCC 97-23, released January 31, 1997 ("Order").

2 See Notice of Proposed Rulemaking, Implementation of Section 402(b)(1)(A) of the Telecommunications Act of 1996, CC Docket No. 96-187, FCC 96-397, released September 6, 1996 ("NPRM"), ¶¶ 8-12 .

to immunize certain LEC tariffs that take effect without suspension from all liability for damages and attorney's fees if they are subsequently found to be unreasonable pursuant to a Commission investigation or another party's complaint. Paragraph 18 of the Order concludes that its "interpretation is compelled by the language of the statute viewed in light of relevant appellate decisions ...." It is plain, however, that the Commission's reading of § 402(b)(1)(A) is not a permissible interpretation of that statute.[3]

First, the Commission cannot reasonably contend that the plain language of § 402(b)(1)(A) requires its conclusion. The NPRM readily found that the section's "deemed lawful" provision is susceptible of at least two readings. Indeed, as the NPRM also recognized, and as AT&T and others showed in their comments,[4] nothing in the ordinary definitions of the word "deem" requires that § 402(b)(1)(A) confer "an immutable status" on LEC tariff filings.[5]

Nor can the Commission rely on the case law it cites to bolster its claim that the meaning of "deemed lawful" is self-evident. The Order relies on two appellate decisions, which it discusses only in a single footnote.[6] However, the Order's unexplained

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3 See generally Chevron U.S.A., Inc. v. NRDC, 467 U.S. 837 (1984).

4 NPRM, ¶10 (citing Black's Law Dictionary); see also, e.g., AT&T Comments at 6, n.13.

5 National R.R. Passenger Corp. v. Boston & Maine Corp., 503 U.S. 407, 408 (1992) ("The existence of alternative dictionary definitions[,] ... each making some sense under the statute, itself indicates that the statute is open to interpretation.").

6 See Order, ¶ 19, n.51. The Commission also cites these two cases and three additional decisions cited therein at ¶ 19, n. 50, but that footnote offers no interpretive gloss of any kind.

analogy to two cases interpreting a FERC regulation governing transfer pricing of raw materials by electric utilities can scarcely be said to constitute a "direct" mandate from Congress in the context of LEC tariffing under the 1996 Act. At a minimum, the Commission has failed to offer an adequate explanation of its rationale.

In fact, the case law simply confirms what the Commission recognized in its NPRM: the phrase "deemed lawful" can establish either a conclusive or a rebuttable presumption that a tariff filed pursuant to § 402(b)(1)(A) is "lawful." The Commission must look to the structure and purpose of the tariffing requirements of the Communications Act and other evidence of congressional intent-- all of which points clearly toward the second interpretation advanced in the NPRM: that is, tariffs "deemed lawful" under § 402(b)(1)(A) should be accorded only a rebuttable presumption of lawfulness.

The two cases the Commission relies on in its Order, Municipal Resale[7] and Ohio Power,[8] considered a FERC regulation governing the price which an electric utility could impute to coal that it purchased from a subsidiary. That regulation provided that when a utility purchased coal from a source it controlled, "the price of which is subject to the jurisdiction of another regulatory body," the price set by that other body would be "deemed to be reasonable" and so includable in the that utility's wholesale

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7 Municipal Resale Service Customers v. FERC, 43 F.3d 1046 (6th Cir. 1995).

8 Ohio Power Co. v. FERC, 954 F.2d 779 (D.C. Cir. 1992).

rates.[9] In both cases, purchasers of electricity sought to challenge, via FERC proceedings, the price a utility paid for its subsidiary's coal. And in both cases, the SEC -- which by express provision of federal law has "overlapping regulatory authority" with FERC over utilities[10] -- had previously approved contract terms controlling that transfer price.

Both Ohio Power and Municipal Resale held that FERC's regulation "deeming" certain transfer prices "reasonable" established a conclusive presumption, and that FERC therefore was bound to permit the utilities to include the disputed purchases in their rate calculations. These decisions, however, are by no means analogous to the Commission's finding in the instant Order. FERC's transfer pricing regulation was a rule of procedure designed to avoid duplicative regulatory proceedings. That regulation provided that once the SEC, the agency which both Municipal Resale and Ohio Power found had exclusive jurisdiction to determine transfer pricing in the relevant context,[11] established a price for a utility's coal purchases, FERC would not revisit that conclusion in a subsequent proceeding. In stark contrast to the Order's interpretation of

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9 See Municipal Resale, 43 F.3d at 1049-50 (citing 18 C.F.R. § 35.14(a)(7)).

10 See, e.g., id., at 1048; Ohio Power, 954 F.2d at 780-81.

11 See Municipal Resale, 43 F.3d at 1050 (stating that per 15 U.S.C. § 79m(b), the SEC is required to approve pricing of captive coal purchases, and that FERC may not disturb that determination); accord Ohio Power, 954 F.2d at 784-85. The SEC filed a brief in Ohio Power in support of its exclusive jurisdiction over the prices at issue. That agency did not participate in Municipal Resale, apparently because by that time FERC agreed that it did not have the power to review coal transfer prices previously approved by the SEC.

§ 402(b)(1)(A), which takes the unprecedented step of holding that LEC tariffs filed pursuant to that section are thereafter immune to any claim for damages despite never having been found "lawful" by the Commission, Municipal Resale and Ohio Power did not rule that the coal prices at issue had been placed beyond the reach of future agency proceedings. Instead, those decisions simply held that the SEC was the agency empowered to review the disputed transfers. In fact, after Municipal Resale was decided, the ratepayers that brought that case sought SEC review of the respondent utilities' pricing in a petition that is still pending before that agency.

Although both cases indirectly concern rate-making for regulated monopolies, neither suggests that the word "deem" has a specialized meaning in the context of tariffing. The Order observes that the FERC regulation at issue deemed certain rates "reasonable" and that tariffed rates are considered "lawful" only if they are reasonable, and concludes that this fact support its interpretation of § 402(b)(1)(A)'s "deemed lawful" provision.[12] However, both Municipal Resale and Ohio Power address an agency rule (not a statute) that simply recognizes a division of authority between two agencies that both courts found was clearly spelled out by Congress in the Public Utility Holding Company Act.[13] Neither case finds significance in the fact that the regulation in

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12 Order, ¶ 19.

13 See, e.g., Municipal Resale, 43 F.3d at 1054 ("FERC's regulation in essence provides that as to one category of transactions ... which are subject to the jurisdiction of another regulatory body, FERC will defer to the other regulatory body ....").

question deemed certain costs "reasonable." There is simply no basis for the Order's finding that Municipal Resale and Ohio Power have any particular significance "in this context"[14] -- that is, as regards tariffing.

At bottom, the decisions the Order cites stand for nothing more than the proposition that "deem" is a term that "generally" indicates a conclusive presumption;[15] they nowhere suggest that term is a talisman which presumptively operates to rework longstanding tariffing law. Indeed, there is abundant authority expressly holding that "deem" can establish a rebuttable presumption.[16] Thus, the Commission cannot reasonably assert that the Order's interpretation is required by the plain language of

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14 Order, ¶ 19.

15 Ohio Power, 954 F.2d at 783. Further, the cases cited in Municipal Resale and Ohio Power (which the Commission cites without elaboration in footnote 60 of the Order) rely on contextual evidence to interpret "deem," rather than simply holding that its meaning is self-evident. See H.P. Coffee Co. v. Reconstruction Finance Co., 215 F.2d 818, 822 (Emer. Ct. App. 1954) (holding "deemed" as used in contract creates conclusive presumption in part because both parties entered into agreement voluntarily); Forrester v. Jerman, 90 F.2d 412, 413-14 (D.C. Cir. 1937) (interpreting statute deeming operator of automobile the agent of its owner; observing that "more than twenty states" had enacted laws of the same "general nature" and adverting to interpretations of those acts). The remaining case cited in the Order provides, at best, only equivocal support for the Commission's interpretation of "deemed." See Gaither v. Myers, 404 F.2d 216, 218 (D.C. Cir. 1968) (observing that the statute interpreted in Forrester "establishes a rebuttable presumption that in case of an accident, the owner of an automobile has given consent to the driver.") (emphasis added).

16 See, e.g., Lavine v. Milne, 424 U.S. 577, 583 (1976) (word "deemed" in welfare statute served only to indicate burden of proof was on applicant for benefits); Conoco, Inc. v. Skinner, 970 F.2d 1206, 1223-25 (3rd Cir. 1992) (statute providing that a corporation "shall be deemed" a citizen of the United States held not to confer constructive citizenship for certain purposes because that construction "would yield harsh or absurd results"); Davis v. Califano, 603 F.2d

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§ 402(b)(1)(A), but must consider that section's "deemed lawful" provision in light of the overall structure and purposes of the Communications Act, as amended by the 1996 Act. As AT&T and other parties demonstrated in their comments, such an examination makes plain that § 402(b)(1)(A) establishes only a rebuttable presumption that a tariff is "lawful."

The tariff provisions of the Communications Act of 1934 rest upon and are defined by more than a hundred years of common law, statutes, and case law governing tariffing.[17] An unbroken line of Supreme Court cases holds that a common carrier's

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618 (7th Cir. 1979) (finding government benefits payable to "legal widow" of decedent, not to woman "deemed" a his widow by Social Security Act); D&B Coal Co. v. Farmer, 613 S.W.2d 853, 854 (Ky. 1981) (statutory word "deemed" establishes a "rebuttable presumption"); Rayle v. Rayle, 202 S.E.2d 286, 288 (N.C. Ct. App. 1974) (holding "'deemed' should have the same meaning as 'presumed'" and "does not create an irrebuttable presumption"); Zimmerman v. Zimmerman, 155 P.2d 293, 300 (Or. 1945) ("the word 'deemed' ... should not be construed as creating a conclusive, but only a disputable presumption"); Erickson v. Erickson, 115 P.2d 172, 177 (Or. 1941) (statutory word "deemed" held to create "rebuttable presumption" and collecting authorities); Brimm v. Cache Valley Banking Co., 269 P.2d 859, 863-64 (Utah 1954) (statute using "deemed" established "rebuttable presumption," collecting authorities); Miller v. Commonwealth, 2 S.E.2d 343, 347-48 (Va. 1939) ("deem" creates "a presumption subject to be overcome with opposing or contradictory evidence," because construing the term to create an irrebuttable presumption would lead to "injustice, inconvenience, hardship, and ... absurdities"); see also MCI December 16, 1996 ex parte, at 2 (citing case law and other authorities holding that deemed does not "creat[e] an immutable status applicable to all situations").

[17] As the NPRM recognized, the Interstate Commerce Act of 1877 was the model for the tariffing provisions of the Communications Act, and courts interpreting the Communications Act have long looked to the jurisprudence of that earlier statute for guidance. See, e.g., MCI v. AT&T, 114 S. Ct. 2223, 2231 (1994). Even prior to the enactment of tariffing statutes, the common law similarly provided for reparations when common carriers charged rates that were found to be

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customers are required by law to pay that carrier's tariffed rate, but permits them to recover damages if they can later establish that the tariffed rate is unreasonable. But, if the Commission makes an affirmative finding that a rate is reasonable, it becomes the "lawful" rate, and customers may not seek reparations for past overcharges.[18] It has long been settled, however, that a Commission decision not to suspend a tariff does not amount to a finding that the rate it imposes is reasonable.[19]

The Order's thus finds that a two-word phrase for which there is no meaningful legislative history indicates Congress' intent to cut a swath through legal doctrines that have stood for more than a century.[20] Further, the Commission's interpretation effectively eviscerates sections 205 and 208 by nullifying the damages and attorney's fees remedies available under those sections, despite the fact that § 402(b)(1)(A) nowhere addresses those provisions, or the damages provisions of § 206.

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unreasonable. See, e.g., Arizona Grocery Co. v. Atchison, T. & S.F. Ry., 284 U.S. 370, 383 (1932).

18 See, e.g., Arizona Grocery, 284 U.S. at 384 ("the legal rate was not made by the statute a lawful rate -- it was lawful only if it was reasonable").

19 See, e.g., Direct Marketing Ass'n v. FCC, 772 F.2d 966, 969 (D.C. Cir. 1985) (cited in NPRM, ¶ 8, n.18).

20 Cf., e.g., United States v. Texas, 507 U.S. 529, 534 (1993) ("[S]tatutes which invade the common law are to be read with a presumption favoring the retention of long-established and familiar principles .... In order to abrogate a common-law principle, the statute must speak directly to the question addressed by the common law.") (internal quotations and ellipses omitted); AT&T Reply Comments, p. 3, n.7; Time Warner Comments, p. 5.

Compounding the implausibility of the Order's interpretation, and turning the purpose of tariffing completely on its head, the Commission's reading of § 402(b)(1)(A) grants this unprecedented exemption from settled tariffing law to the sole remaining monopolists in the nation's telecommunications markets. The Order would permit LECs that enjoy monopolies in their service areas immunity from damage awards, while retaining liability for interexchange carriers, whose prices are subject to the discipline of a market that the Commission has found is highly competitive.[21] The purpose of tariffing requirements has always been to prevent potential abuses by firms with monopoly power over essential services. To justify its assumption that Congress decided in the 1996 Act to invert this centuries-old logic, the Commission must be able to point to far more than an isolated phrase in a single subsection of that statute.

Finally, it is patently unreasonable to assume, absent compelling evidence to the contrary, that Congress sought to permit LECs to benefit from rates that are unjust or unreasonable. Under the Order's reading of § 402(b)(1)(A), if a tariff was found after its effective date to have been based on intentionally falsified data, the guilty carrier would have the legal right to retain all of its ill-gotten profits up until the date that the Commission prospectively declared the tariff unreasonable. It would be strange indeed if the legislature had intended this unjust result. In addition, such a policy would create

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[21] Despite the assertions of some ILEC commenters that their pricing will be constrained by local exchange competition, it is an inescapable fact that at present, and for some future period of unforeseeable duration, they possess tremendous market power.

tremendous perverse incentives for LECs to make "mistakes" -- inadvertent or otherwise -- in their tariff filings.

Finally, despite the claims of some commenters, the Order's interpretation cannot properly be deemed "deregulatory." In a competitive market, purchasers can challenge contract terms after-the-fact on myriad grounds, such as fraud or mistake. However, the Order's interpretation would create a layer of regulation immunizing sellers from this legal safeguard -- while eliminating the sole remedy currently afforded to those purchasing services pursuant to LECs' tariffs.

## II. THE COMMISSION'S OWN FINDINGS REQUIRE IT TO ALLOW COMMENTERS AT LEAST TWO BUSINESS DAYS TO PREPARE OPPOSITIONS TO LEC TARIFF FILINGS UNDER § 402(b)(1)(A)

The Order requires that petitions opposing LEC tariff transmittals that are effective in 7 days must be filed no later than three calendar days from the date the tariff is filed.[22] In the same paragraph of the Order, the Commission rejected a Southwestern Bell proposal that would have required such petitions to be filed within one business day, on the ground that it would "unreasonably abbreviate the amount of time within which to submit filings."[23] It is inevitable, however, that the rule the Commission adopted will lead to precisely the result it rejected as "unreasonable."

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22 Order, ¶ 78.

23 Id. The Commission also rejected on the same grounds an AT&T proposal that LECs file their responses to petitions opposing their tariff filings within one business day. AT&T's position is not inconsistent with its argument that one day is insufficient for oppositions to LEC tariffs. Because LECs will already be familiar with the contents of their own tariff filings, they should not require as

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Under the Order's timetable, LEC tariffs effective on 7 days notice will predictably be filed with the Commission just before the close of business on Fridays. Even with e-mail notification procedures in place, potential commenters will have only one business day to obtain, review and respond to such filings. Having found in the Order that it should continue pre-effectiveness review, and that it should permit the public to comment on § 402(b)(1)(A) filings, the Commission must ensure that the opportunity it affords for comment is in fact meaningful.

To provide a meaningful opportunity for comment on tariffs effective in 7 days, the Commission should require that the three calendar days which commenters are allotted to prepare their petitions must include at least two business days. Such a requirement would permit a LEC to take advantage of 7-day filing, except in cases in which it may opt to file on a day which, due to intervening holidays or weekend days, will extend the period for pre-effectiveness review beyond that time. Because the date on which a LEC files is wholly within its own control, such a rule is within the Commission's authority under § 402(b)(1)(A).

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much time to prepare pleadings concerning those filings as will parties opposing those tariffs.

## III. RATE-OF-RETURN LECs SHOULD BE REQUIRED TO FILE TRP MATERIALS 90 DAYS IN ADVANCE OF THEIR ANNUAL ACCESS TARIFF FILINGS

The Order requires price cap LECs to file their tariff review plan ("TRP") materials, without proposed rates, ninety days prior to their annual access filings.[24] The Commission expressly found that the "volume and complexity" of TRP materials is such that a shorter period "would be inadequate to allow interested parties to review these filings carefully."[25] However, the Order permits rate-of-return LECs to file their TRPs concurrently with their annual access tariffs, that is, either 7 or 15 days before those tariffs take effect.

The Commission gave no basis for its distinction between price cap and rate-of-return LECs, and the logic of its Order appears to admit none.[26] As AT&T stated in its comments, "the volume and complexity of the TRPs and cost support data filed by rate-of-return LECs is no less than that filed by price cap carriers."[27] Further, parties that wish to review rate-of-return LECs' annual access filings must undertake the same analyses required to evaluate price cap LECs' filings. Accordingly, the logic of the Order

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24 Order, ¶ 102.

25 Id.

26 Cf., e.g., Bowman Transp., Inc. v. Arkansas-Best Freight System, 419 U.S. 281, 285 (1974) (agency must provide a "rational connection between the facts found and the choice made").

27 AT&T Comments, p. 18 (emphasis added).

compels the conclusion that rate-of-return LECs must be required to file TRP information 90 days prior to their annual access filings.

## IV. LECs SHOULD BE REQUIRED TO FILE SUPPORTING MATERIALS IN ADVANCE OF ANY MID-TERM TARIFF FILING THAT REQUIRES A CHANGE IN THEIR PCIs

AT&T's comments demonstrate that the same reasoning the Commission adopted in requiring advance filing of TRPs for annual access filings applies with equal force to mid-term LEC tariff filings that propose changes to any of their PCIs.[28] Such filings, like annual access tariffs, are voluminous and highly complex, and therefore cannot be adequately evaluated by the Commission or by other parties within the abbreviated periods the Order establishes for review of rates under § 402(b)(1)(A). Also, changes in PCIs often are the result of significant shifts in the Commission's rules. For example, implementation of changes to the Commission's payphone regulations or its access charge regime will necessitate long and highly complex LEC tariff filings revising their PCIs. These measures are far too important to be permitted to take effect after only the relatively cursory review possible under a 7- or 15-day timetable.

Although this issue was squarely presented by AT&T and other commenters, the Order did not address it. AT&T requests that the Commission adhere to the same logic that led it to require advance filing of annual access TRPs, and hold that LECs must provide TRPs and cost support data, with proposed rates omitted, 30 days in

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[28] Id., pp. 18-19.

advance of any mid-term change to their PCIs, whether such changes are initiated by a LEC or by the Commission itself.

## CONCLUSION

For the reasons stated above, the Commission's should reconsider its Report and Order implementing the LEC tariff streamlining provisions of § 402(b)(1)(A).

Respectfully submitted,

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